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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 714.

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

RESISTANCE OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petition in the case at bar obviously fails to comply with Rule 23 of the Rules of this Court. The "statement of the case" is a mere statement of some of the facts. It is inaccurate and misleading and fails to advise the Court about the specific issues and how they were decided. Throughout the petition there are constant misstatements

of the record that are very misleading. We feel constrained to make a restatement of the case.

(1) The nature of the action.

This is an action at law on an alleged contract for temporary life insurance based upon a conditional receipt given to W. Max Hinkle, the proposed insured, for the payment of a first premium in connection with an application for a life insurance policy. It was removed from the District Court of Polk County, Iowa, to the United States District Court for the Southern District of Iowa on the ground of diversity of citizenship between the parties.

A photostatic copy of the receipt is in the Record (p. 17), and the original receipt has been certified to this court.

The proposed insured was killed in an aeroplane accident the day after the receipt was given and before he had taken the medical examination required.

(2) The claim upon which the action is based.

The original petition, as it is denominated under Iowa practice, was in four counts. In the first two counts, the plaintiff sued as administratrix of the proposed insured's estate, in Counts III and IV she sued in her individual capacity as beneficiary named in the application for the policy. Counts I, II and III were withdrawn from the jury, so that the only Count left in the case at the time of its submission to the jury was Count IV.

In preparing the petition, opposing counsel chose to repeat the allegations of Counts I and II in Count IV by reference only, so that it is necessary to read Counts I and II to find the substantive allegations of Count IV.

Count I (R. 2) is based on the claim that the conditional receipt in itself was a contract of temporary insurance

effective immediately and that by reason of the death of W. Max Hinkle on February 26, 1955, the plaintiff as his administratrix is entitled to $10,500.00.

Count II (R. 4) repeats Count I and further alleges that the medical examination of the proposed insured was excused by his death before the time set by him and the defendant for said medical examination or it was waived by the defendant.

Count IV (R. 6) adopts by reference these two claims made by the plaintiff in her representative capacity as administratrix of the proposed insured's estate and alleges that she is entitled to recover as "the named beneficiary of the insurance."

(3) The defenses made to the claim.

The defenses to Count IV were as follows:

(1) That the conditional receipt was not a contract of temporary insurance, but a mere receipt delivered in connection with an application for life insurance, which was never completed by the proposed insured because he failed to take the medical examination required as a part thereof. (R. 8 and 9)

(2) That said receipt was conditioned upon the receipt of satisfactory evidence at the home office of the defendant in Boston that the proposed insured was insurable for the amount, plan and rating applied for; that because of the failure of the proposed insured to take a medical examination, no such satisfactory evidence has ever been received by the defendant at its Home Office in Boston and the insurance applied for never went into effect. (R. 9)

(3) That if the receipt is construed, because of the insertion in the receipt of the words "Immediate Coverage",

to be an agreement on the part of the defendant's agent that the insurance applied for would take effect immediately upon delivery of the receipt, said agreement was not authorized by the defendant and was not binding upon it. (R. 10)

(4) That the proposed insured was not insurable for the amount, plan and rating applied for on account of his aviation record, and could not furnish satisfactory evidence that he was so insurable, and therefore the insurance applied for never went into effect. (R. 11-12)

(5) That the defendant was prohibited under the laws of Iowa from issuing a policy of life insurance in the amount of $10,500 without a medical examination and the proposed insured knew that a medical examination was required, and because of the failure to take said medical examination, no complete application was ever made pursuant to which a valid policy or contract for $10,500 of life insurance could be issued under the Iowa statute. (R. 12)

(4) The issues actually tried and how they were decided.

Under the instructions of the court only one issue was actually tried, namely, whether the proposed insured was in good health on the date of the receipt. At the close of the evidence the defendant made a motion for a directed verdict in its favor (R. 55) which was overruled and the court then instructed the jury that there was only one issue in the case, namely, whether the proposed insured was in good health on the date of the receipt; that if he was in good health, the conditional receipt created a contract of temporary insurance which remained in force until the defendant acted upon the application, and although defendant had not acted on the application, the contract of temporary insurance was in force on the date following the applica-

tion, when the proposed insured was killed. (R. 63) Counts I, II and III were withdrawn from the jury. (R. 54)

On this issue the jury returned a verdict for the plaintiff Maxine K. Hinkle, in her individual capacity as beneficiary named in the application, for $10,500, the full amount of the insurance applied for and judgment was entered thereon. (R. 70-71)

(5) The facts disclosed by the evidence.

Rodney Bliss, Jr., had been the general agent of the defendant in Des Moines, Iowa, for eight years. His contract with the defendant was introduced in evidence as Exhibit B (R. 36) and in Section 2 thereof he is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf of, or in the name of the Company, or to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

Bliss did not know W. Max Hinkle, the proposed insured, but heard that he had a mortgage on his home and was employed by G. W. Onthank Company of Des Moines. One of the policies issued by the defendant is a decreasing term policy as described in its pamphlet Exhibit C. (R. 38, 36) It provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The initial death benefit is $1,050 per unit, and the minimum amount issued is ten units, $10,500 initial risk. On the 20 year plan, the death benefit for ten units would be $10,500 in the first year as shown by the table in Exhibit C (R. 39) and would decrease $500 per year. If premiums were payable quarterly the first quarterly premium at age 42, Hinkle's age, would be $21.70. (R. 39)

Bliss called on Hinkle at the office of the Onthank Company on February 25, 1955, after a telephone conversation in which he had explained briefly to Hinkle the coverage of a decreasing term policy. He obtained Part I of an application for ten units with an initial death benefit of $10,500. Hinkle signed Part I of the application (Exhibit D, R. 19, 36) which was filled out to cover all the information Bliss had to obtain from Hinkle. The original application has been certified to this court. Hinkle gave Bliss a check payable to the New England Mutual Life Insurance Company for $21.70, the first quarterly premium (Exhibit E, R. 40, 36). This check was never deposited in the bank. It was held by Bliss pending an investigation by a Des Moines law firm purporting to represent Mrs. Hinkle, then returned to her on May 19, 1955. (Exhibit G, R. 41, 36) It was subsequently returned to Bliss by her attorney of record in this action and was tendered to her by the answer in this case. (R. 10)

When the premium was paid Bliss detached from the application the conditional receipt at the bottom of the application form. (R. 34) This receipt was a printed form. It contained blanks for filling in the amount of the payment, the amount of the insurance applied for, the name of the proposed insured, the date and the signature of the agent. Said receipt was introduced in evidence as Exhibit 1. (R. 17,29) Bliss filled in the amount paid "Twenty one and 70/100"; the amount applied for, "$10,500.00", the name of the proposed insured (W. Max Hinkle), the date and his own signature and wrote under the figures "$10,500.00" the words "Immediate Coverage". He testified that he explained to Hinkle that this was meant to give the amount of the initial death benefit. Without some such qualification the receipt would indicate that the insurance would always be in the face amount of $10,500 whereas under this policy the amount was reduced $500 every year. It

was explained to Hinkle that as the mortgage on his home was gradually reduced by partial payments, the amount of insurance would also be gradually reduced. (R. 35, 32-33)

Part I of the application was not completed at the time with the form and amount of insurance because that had been orally agreed upon, but Bliss testified that he asked Hinkle all the questions to which answers appear on the application and wrote them down in Hinkle's presence before Hinkle signed the application. He said that Hinkle answered "no" to the aviation question 17-a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" (R. 33) Mrs. Hansen, a clerk in the same office, said that she did not hear Bliss ask Hinkle this question but she was busy at her own work and paid no particular attention to the conversation until Bliss picked up the telephone to call Dr. Posner. (R. 29-30) She and Robert Evans who was in and out of the office while Bliss was there testified that it was common knowledge at the office that Hinkle had been flying as a pilot for years. (R. 52-53) Bliss testified that he knew nothing whatever about Hinkle's aviation activities. (R. 34)

After the application had been signed and the receipt delivered Bliss asked Hinkle when he could take the medical examination and Hinkle said "today". Bliss then telephoned Dr. E. R. Posner, the medical examiner of the company at Des Moines, for an appointment. (R. 34) There is some conflict in the evidence as to the exact time the conversation took place. Mrs. Hansen, the clerk referred to, testified it was after lunch. Bliss said it was between 11 and 11:30 A. M. Bliss testified that he made an appointment with Dr. Posner for Hinkle at 11:45 that morning, that just as he was hanging up the phone Hinkle told him he was too busy and the appointment was made for 11:30 the fol-

lowing Monday. (R. 34) This was verified by Dr. Posner in his testimony. (R. 31) Mrs. Hansen, who was in Hinkle's office, testified that she heard Bliss tell Hinkle that the doctor could not see him that day and that the appointment was then made for Monday morning. (R. 29)

Hinkle was killed while flying his plane which crashed near Des Moines the following day, Saturday.

The plaintiff, Mrs. Hinkle, testified that when she got up that Saturday morning her husband had gone and she found the conditional receipt on the kitchen table. Hinkle had planned to fly to Omaha that morning. (R. 29)

Under the underwriting rules and practices of the defendant, if a proposed insured was a pilot, he was asked to fill out an Aviation Questionnaire (R. 47) and the application Exhibit D, states at the bottom of its aviation section No. 17, after the questions with regard to aviation: "If answer to A, B or C is yes, complete Aviation Questionnaire". (R. 19) The aviation questionnaire in use by the defendant was introduced in evidence as Exhibit H. (R. 42, 36) It states at the top that it must be submitted if the proposed insured plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It contains a detailed list of questions showing the flying record, license, ownership of aircraft, etc. It contains the following instruction at the bottom:

> "Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is
>
> ( ) full coverage with extra premium, or
>
> ( ) standard rate with aviation exclusion desired?"

In case of a pilot, if the proposed insured desired a full coverage with extra premium, he would be required to pay $3.75 extra premium for each $1,000 of insurance.

(R. 47) If he desired the standard rate with aviation exclusion, he was required to sign an amendment limiting aviation coverage. The form of amendment was introduced in evidence as Exhibit I. (R. 44, 36) It provides in substance that if the death of the insured results from travel or flight or descent from or with any kind of aircraft of which the insured is acting as a pilot, the liability of the Company under the policy shall be limited to the premiums paid, less dividends, or the reserve whichever is greater. There is a place at the bottom for the signature of the proposed insured, to be witnessed by the agent.

Hinkle's aviation record was stipulated and shows that he had had a pilot's license from the Civil Aeronautics Administration since November, 1946, that he owned four aeroplanes in partnership with others; that he piloted a plane from the municipal airport in Des Moines every Sunday when weather permitted, that when he applied for a pilot's license in December, 1954, he reported total flying time of 1,450 hours as a pilot, 43 of which occurred during the last six months of 1954. (R. 49-50)

Under the underwriting rules and practices of the appellant, if this record had been disclosed in the aviation questionnaire, Hinkle would have been given his choice to pay an extra premium for full coverage or to have the amendment limiting coverage attached to his policy. He was not insurable on the plan and for the rating applied for. If he had taken the medical examination, a report would have been obtained from the Retail Credit Company, which would have covered his aviation record and the policy would not have been issued as applied for. (R. 47)

The only evidence as to the good health of the proposed insured was that he passed an examination for a

pilot's license on December, 1954. (R. 50) There was no evidence as to the qualifications for such a license, and no medical and no lay testimony as to the proposed insured's state of health on February 25, 1955.

Part I of the application, Exhibit D, was never forwarded to the home office of the defendant. (R. 47)

After Hinkle's death Bliss told the plaintiff that the defendant would not pay her because there had been no physical examination. (R. 29)

A subsequent investigation was made by a firm of lawyers in Des Moines on behalf of Mrs. Hinkle and Bliss sent them the application. (R. 40) It was subsequently returned to Bliss and the check was returned to Mrs. Hinkle. (R. 41) Another lawyer was later retained and this suit was commenced.

We do not want to abuse the patience of the Court by going through the petition and pointing out each misstatement of the record. We do, however, want to call the Court's attention to two important misstatements. The petition refers again and again to what opposing counsel seems to consider an estoppel from asserting that the receipt did not constitute a temporary contract of insurance, and he says: "Plaintiff did plead estoppel here." There is no mention of estoppel in the petition. The plaintiff filed a reply in which estoppel is pleaded four times. The first is in Division III (R. 22), where the plaintiff claimed that the defendant was estopped from pleading the agent's lack of authority to bind the company by a contract of temporary insurance. This question was not considered by the Court of Appeals in view of its holding as to insurability as stated in its opinion. The second plea of estoppel is in Division IV (R. 23) where the plaintiff alleges that the defendant is estopped under Section 511.34 of the Iowa Code from proving

the application for the policy because no copy was given to the applicant. The Iowa statute relates only to actions on a policy when issued and as no policy was issued here the statute does not apply. The third plea in Division V (R. 24-27) is that the defendant is estopped from pleading that the alleged contract of insurance was invalid under Sec. 508.28 of the Iowa Code prohibiting a life insurance company from issuing a policy in excess of $10,000 without a medical examination. The Court of Appeals held that the defense under this statute raised an unsettled question of Iowa law upon whether it was deemed unnecessary and hence inadvisable to express an opinion. The fourth plea is in Division VI (R. 27) which is a repetition of the second plea referred to above. We can find no pleading asserting that the defendant was estopped from asserting the invalidity of the receipt as a contract of temporary insurance because the proposed insured was not insurable for the plan and rating applied for. In this state of the record, the argument of counsel as to "mending his hold" and the Iowa cases purporting to deal with estoppel give no ground for granting the writ.

The other important misstatement is that the vice president of the defendant "testified that Hinkle was insurable for every plan they had and for any amount they had." The actual testimony is as follows:

"If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without any extra rating or without the limited aviation coverage." (R. 47)

"If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be *eligible* for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money." (R. 48) (Emphasis ours)

(6) Decision of the Court of Appeals.

The Court of Appeals applied the Iowa law on the question of conditional receipts given in connection with applications for life insurance as laid down in the case of *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, the only Iowa case on the subject. The substance of the opinion in this case is that because the proposed insured was not insurable for the plan and rating applied for as required by the receipt on account of his aviation activities, no contract of temporary insurance ever went into effect. Therefore, the Court held that the defendant was entitled to have its motion for directed verdict sustained.

In view of its decision on this question the Court said that the other issues argued by the parties and also raised by the motion for directed verdict had been considered but did not warrant discussion for the reason that its holding on insurability compelled a reversal. We submit that the defendant was entitled to a directed verdict on the other grounds stated in its motion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

A writ of certiorari should not be granted for the following reasons:

1. This is a suit involving the construction of the specific language of a private contract removed to the federal court because of diversity of citizenship and is not of public importance.

Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712.

Rice v. *Sioux City Cemetery*, 349 U. S. 70, 99 L. ed. 897.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 67 L. ed. 922.

Hamilton Brown Shoe Co. v. *Wolf Bros.*, 240 U. S. 251, 60 L. ed. 629.

2. This is a suit on an Iowa contract and the Court of Appeals correctly followed the Iowa law as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, and its determination of the Iowa law should be accepted by this court.

Reynolds v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207.

King v. *United Commercial Travelers*, 333 U. S. 153, 92 L. ed. 668.

Meredith v. *Winter Haven*, 320 U. S. 228, 88 L. ed. 9.

Ragan v. *Merchants Transfer & Warehouse Co.* 337 U. S. 530, 93 L. ed. 1520.

Helvering v. *Stuart*, 317 U. S. 154, 87 L. ed. 154.

Spiegel's Estate v. *Commissioner*, 335 U. S. 701, 93 L. ed. 330.

Mutual Life v. *Johnson*, 293 U.S. 335, 79 L. ed. 398.

3. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals on the same matter.

Liberty National Life v. *Hamilton*, (6th Cir.) 237 F. 2d 235.

Gaunt v. *John Hancock Mutual*, (2nd Cir.) 165 F. 2d 599.

Ruhlin v. *New York Life*, 304 U. S. 202, 82 L. ed. 1290.

New York Life v. *Jackson*, 304 U. S. 261, 82 L. ed. 1329.

Rosenthal v. *New York Life*, 304 U. S. 263, 82 L. ed. 1330.

Lyon v. *Mutual Benefit*, 305 U. S. 484, 83 L. ed. 303.

Mofrad v. *New York Life*, (10th Cir.) 206 F. 2d 491.

Warren v. *New York Life*, (5th Cir.) 128 F. 2d 671.

Bellak v. *United Home Life*, 211 F. 2d 280.

4. No federal constitutional question is involved.

5. No question of federal jurisdiction is properly before this court.

Louisville C. & R. Co. v. *Letson*, 43 U. S. (2 How.) 497, 11 L. ed. 353.

ARGUMENT.

I.

Not a case of public importance.

Rule 19 of the Rules of this Court provides that a review on writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons therefor. This is a diversity case and while it is of importance to the parties it is not of importance to the public. It is a suit on a conditional receipt given for the payment of a first premium in connection with an application for a life insurance policy, and governed by the law of Iowa. Every suit brought on such a receipt has to be determined by construing the exact language used. No question of general insurance law of importance to the public at large is involved.

Such a case is not one calling for the granting of a writ of certiorari under the statute or under the rules of this Court. In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 67 L. ed. 712, a patent case, in dismissing a writ of certiorari as improvidently granted, this Court, speaking by Chief Justice Taft, said:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

This language was cited with approval in *Rice* v. *Sioux City Cemetery*, (1955) 349 U. S. 70, 99 L. ed. 897.

Again in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. ed. 922, the Court, speaking by Chief Justice Taft, said:

> "The jurisdiction to bring up cases by certiorari from Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decisions between those Courts in the nine circuits; and second, to bring up cases involving questions of importance which is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

In *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, 60 L. ed. 629, the Court, speaking of the exercise of its jurisdiction to review judgments and decrees by certiorari, said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions." (Citing cases.)

The contentions advanced by the petitioner here with respect to the construction of the receipt were advanced and urged in the Court of Appeals, which Court decided

such questions adversely to the petitioner. The petitioner seeks a writ in order to procure a rehearing of private questions, of importance only to the parties, the granting of which would be contrary to the settled rules and decisions of this Court.

II.

The Iowa law governs this case and it was determined by the Court of Appeals under the Iowa law.

We cannot understand the repeated assertions of opposing counsel under Part I of "Questions Presented" in the petition that the Court of Appeals violated the rule in *Erie Railway* v. *Tompkins* by refusing to follow the Iowa law. This was an Iowa contract and of course the Iowa law was binding on the federal court. The Iowa law was laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N. W. 207, which involved a receipt for a first premium conditioned upon the insurability of the applicant. The Iowa court said:

> "The insurability of the applicant on the date of the medical examination is by the contract made the test of the company's liability."

The applicant in the Reynolds case had a medical examination and was found by the medical examiner to be insurable but information obtained after his death showed that he was not. Therefore the Court held there was no liability under the receipt and the Company was entitled to a directed verdict. This is the only Iowa case on the subject and it is stronger in favor of the plaintiff than the case at bar because there was an actual medical examination which was satisfactory. The other Iowa cases cited in the petition do not involve receipts for first premiums. The Reynolds case is in line with the weight of authority in this country as pointed out by the writer of the ex-

haustive note on temporary life insurance in 2 A. L. R. 2d 943, on page 987.

On page 3 of the petition opposing counsel purports to state the law of Iowa as laid down in the Reynolds case and another Iowa case in quotation marks. The two quotations are followed by the titles of the cases. Anyone reading these quotations would certainly think they were quotations from the cases cited. However, they are not quotations at all and no such language can be found in the opinions. They only represent counsel's contention as to what the Iowa law is and they are not correct statements of the Iowa law as laid down in the two opinions.

The Court of Appeals did not determine the Iowa law on the authority of the agent to make a temporary contract of insurance in view of its determination of the Iowa law relating to the conditional receipt, but merely referred to it as a "serious question". There is therefore no error in the Court's opinion as to the authority of the agent under the Iowa law, as this question was not decided.

Counsel complains that the Court of Appeals erred in holding that good health and insurability were synonymous. There is no Iowa case on this point and although counsel asserts that there is a "split of authority" he cites no case contrary to those cited by the Court of Appeals. It is clear that in the absence of an Iowa decision the court had a right to determine the general law on the subject as held by the Court in *King* v. *United Commercial Travelers*, 333 U. S. 153, 92 L. ed. 608, and many other cases.

And as pointed out by Justice Stone in *Meredith* v. *Winter Haven*, 320 U. S. 228, 88 L. ed. 9, if the highest court of the state had not answered a question of state law and the character of the answers which the highest state courts might ultimately give remained uncertain, the federal courts would not hesitate to decide them in diversity cases.

It seems to us that opposing counsel has taken two absolutely inconsistent positions. In one breath he says that the Court of Appeals violated the Erie Railway case because it did not follow Iowa law. In the next breath he says that the federal courts should adopt a uniform rule with respect to conditional receipts. Obviously this is impossible for two reasons. The receipts used by the various companies are not uniform and the federal courts in determining the law of the various states could not adopt a uniform rule when the decisions of the various states are not uniform. The only way to achieve uniformity (assuming uniformity in the receipts) would be to overrule the Erie case and adopt a federal rule regardless of state decisions.

On the issue decided by the Court of Appeals the Court did determine what the Iowa law was, and followed it and it is not a function of the writ of certiorari merely to give the defeated party another hearing on the correctness of that determination. As stated by Mr. Justice Douglas in *Ragan* v. *Merchants Transfer & Warehouse Company*, 337 U. S. 530, 93 L. ed. 1520, in referring to a holding of the Court of Appeals for the Tenth Circuit with respect to the law of Kansas:

> "It is argued that the Kansas Statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. *We ordinarily accept the determination of local law by the Court of Appeals* (see Huddleston v. Dwyer, 322 U. S. 232, 237, 88 L. ed. 1246, 1249, 64 S. Ct. 1015), and we will not disturb it here." (Emphasis ours).

At the same term Mr. Justice Reed in *Helvering* v. *Stuart*, 317 U. S. 154, 87 L. ed. 154, speaking of the decision

of a Court of Appeals construing a trust under the law of Illinois said:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment."

And in *Spiegel's Estate* v. *Commissioner*, 335 U. S. 701, 93 L. ed. 330, which also involved the construction of a trust under Illinois law, Mr. Justice Black said:

> "The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law."

To paraphrase the above opinions, it might well be said with respect to this case that the opinion of the Court of Appeals was written by Judge Van Oosterhout, a distinguished member of the Iowa bar with long experience in the jurisprudence of that state, after a careful considera-

tion of the law of Iowa and that his determination of the Iowa law should be accepted by this Court.

Although the case was decided before Erie Railway, we call the Court's attention to *Mutual Life* v. *Johnson,* 293 U. S. 335, 79 L. ed. 398. The suit involved a life insurance policy with disability benefits and the question was whether the insanity of the insured excused him from filing proof of disability. The contract was a Virginia contract and the question had been decided in favor of the insured by the Supreme Court of Virginia. Mr. Justice Cardozo speaking for a unanimous court said:

> "In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law merchant is present in this case. Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865. No question is here as to any general principle of the law of contracts of insurance (Carpenter v. Providence Washington Ins. Co., 16 Pet. 495, 511, 10 L. ed. 1044; 1051; Aetna L. Ins. Co. v. Moore, 231 U. S. 543, 559, 58 L. ed. 356, 366, 34 S. Ct. 186), with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and

to that one. With choice so 'balanced with doubt', we accept as our guide the law declared by the state where the contract had its being."

This case also involves the meaning of a particular set of words in a particular receipt and the federal courts under the Erie Railway doctrine must be guided by the law of Iowa.

III.

Alleged conflict with opinions of other Courts of Appeal.

An examination of the opinions in *Liberty National Life* v. *Hamilton*, (6th Cir.) 237 F. 2d 235 and *Gaunt* v. *John Hancock Mutual*, (2nd Cir.) 165 F. 2d 599, will conclusively show that there is no conflict between them and the decision of the Court of Appeals for the Eighth Circuit in the case at bar. Obviously there can be no such conflict because these decisions do not attempt to determine the Iowa law.

Before the Erie Railway decision on April 25, 1938, many questions of life insurance law were regarded as questions of general law and it was not uncommon to grant certiorari in life insurance cases where there was a conflict in the circuits. For instance in *Ruhlin* v. *New York Life*, 304 U. S. 202, 82 L. ed. 1290, the question of the contestability of disability and double indemnity provisions under the contract in question was regarded in the courts below by both courts and counsel as a question of general law. Certiorari was granted January 3, 1938 (302 U. S. 681, 82 L. ed. 526), on account of conflict of circuits. But the case was decided in this Court a few days after the Erie Railway decision. Mr. Justice Reed quoted from *Mutual Life* v. *Johnson*, 293 U. S. 335, *supra*, and held that the ques-

tion of power was settled by the Erie Railway case and the subject would now be governed by the decisions of the appropriate state court. He said:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts * * *"
>
> "No decision at the present time could reconcile any 'conflict of circuits' or do more than annunciate a tentative rule to guide particular federal courts. Therefore, even assuming that it is adequately presented on the record, we decline to decide the issue of state law."

To the same effect are *New York Life* v. *Jackson*, 304 U. S. 261, 82 L. ed. 1329, and *Rosenthal* v. *New York Life*, 304 U. S. 263, 82 L. ed. 1330, decided two weeks later. Both cases were decided in the Circuit Courts before Erie Railway as matters of general law and were remanded for determination under governing state law.

In *Lyon* v. *Mutual Benefit*, 305 U. S. 484, 83 L. ed. 303, decided in January, 1939, the decision of the Circuit Court made prior to Erie Railway was reversed because the Circuit Court acted without any reference to governing state law and did not follow an Arkansas rule of procedure.

Furthermore there is no actual conflict between the decision in this case and the decisions in the second and sixth circuits referred to.

In the *Gaunt* case, 165 F. 2d 599, the receipt was conditioned upon insurability and the approval of the application at the home office of the company prior to the applicant's death. The applicant had taken a medical examination and had been found insurable by the medical examiner but was killed before the approval of the application at the

home office. The lower court found that the application would have been approved if the company had not been notified of the applicant's death. The substance of the opinion is that the receipt which is entirely different from the receipt in the case at bar was ambiguous and having been prepared by the insurance company should be construed against it.

This case is not in conflict with the case at bar for two reasons: (1) In the case at bar the applicant had not been examined and found insurable and the Court of Appeals held that it was conclusively proved that he was not insurable for the plan and rating applied for because of his aviation activities. The Court was thoroughly justified in using the word "conclusively" because the only evidence on the subject was that of the Vice-President of the company who testified that in view of such activities the contract would not have been issued as applied for. If issued it would have contained an aviation exclusion clause or provided for an extra premium; (2) no claim was made in the pleadings or in argument that the receipt in the case at bar was ambiguous and any layman reading it would know that it was a conditional receipt and that the two provisos, good health and insurability, had to be complied with. The Court of Appeals said:

> "From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt ambiguous * * *"

In the *Liberty National* case, 237 F. 2d 235, the receipt was denominated as a "binding receipt" in the briefs and it referred to "the insurance granted hereunder." The applicant had a physical examination by the Company's examiner and disclosed his entire medical history and the court found that the examination was satisfactory. There

was lay and medical testimony that the applicant was insurable and said testimony was sufficient to raise a question for the jury. Here again the court found ambiguity and resolved it against the Company. It was a Tennessee contract and the court after examining the Tennessee decisions was in doubt as to the local law involving ambiguities as to the time when the insurance would become effective. Certainly the reference to "insurance granted hereunder" would lead the applicant to believe that he was already covered. In the case at bar the receipt was entitled "Conditional Receipt". It recites that it was made "in connection with an application" for insurance and it refers specifically to the "insurance applied for", not to the "insurance granted hereunder". Furthermore, as stated above, there was no evidence in the case at bar that the applicant was insurable on the date of the receipt. On the contrary the evidence showed that he was not insurable for the plan and rating applied for. No claim of ambiguity was made by the plaintiff.

The decision in the case at bar is in line with the decision of the Court of Appeals for the 10th Circuit in *Mofrad* v. *New York Life*, 206 F. 2d 491 and with *Warren* v. *New York Life* in the 5th Circuit, 128 F. 2d 671. Counsel complains because the law is different in different jurisdictions and it is undoubtedly true that the law of insurance varies in different states. The same court which decided in favor of the plaintiff in the *Liberty National* case, *supra*, held that there was no temporary contract of insurance in *Bellak* v. *United Home Life*, 211 F. 2d 280, because there it was bound by the law of Michigan. This divergence of opinion in different states is no ground for granting the writ of certiorari in this case where the Court of Appeals followed the Iowa law. See *Ruhlin* v. *New York Life*, 304 U. S. 202, 82 L. Ed. 1290, *supra*. Certainly it

cannot be said in the words of Chief Justice Taft, *supra*, that "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Counsel asserts that if the plaintiff had sued in the Sixth Circuit she would have won. There is no basis for this assertion. The decision would have been based on local law. For example, if the contract had been a Michigan contract she would have lost under the law of Michigan as pointed out above, and if she had sued in Tennessee on a contract governed by its law, there is no reason to believe that the Court of Appeals for the Sixth Circuit would have decided in her favor in the absence of ambiguity in the receipt.

Counsel claims that the Court of Appeals erred in not following the Iowa law on the general principles of estoppel. He says that the Liberty National case was decided on the ground of estoppel and that the Iowa law on estoppel is the same as the Tennessee law. We cannot find a word about estoppel in the Liberty National decision; it was based on ambiguity in the receipt. He also says that the dissenting opinion in the case at bar held the defendant estopped under Iowa decisions to set up each and all defenses it claimed. We cannot find the words "estoppel" or "estopped" in the dissenting opinion and it cites no decisions of any court. As we pointed out in the statement of the case, *supra*, there is no plea that the defendant was estopped from asserting that there was no contract of temporary insurance because the applicant was not insurable for the plan and rating applied for. There was no such question of estoppel raised in the lower court or in the original hearing before the Court of Appeals. The Iowa cases on estoppel cited in the petition were not cited by the plaintiff in her brief upon the

original submission in the Court of Appeals. The question was raised for the first time in the petition for rehearing.

We have searched with care the indices in the volumes of the Lawyer's Edition of Supreme Court reports from the date of the Erie Railway case through Vol. I of the Second Series and while we cannot determine how many petitions were filed in life insurance cases we cannot find any where certiorari has been granted involving the construction of a life insurance contract according to state law by a court of appeals where the court of last resort in the state had determined the state law on the question. As a result of the Erie Railway decision, conflict in the circuits has ceased to be a ground for granting the writ where the question involved is decided by a determination of the law of the state. The reason for this is plainly pointed out in Mr. Justice Reed's opinion in the *Ruhlin* case, *supra.*

IV.

No federal constitutional questions involved.

The assertions in the petition as to the violation of the plaintiff's rights under the Fifth and Seventh Amendments seem to us fantastic. They are incoherently expressed and impossible to understand. We have read them several times and we really do not believe they merit a reply. However, we do not like to let them go unchallenged, and we will try to state them in an orderly manner for the consideration of the Court. As well as we can understand them, the claims are as follows:

1. That the Court of Appeals violated the plaintiff's right to due process of law under the Fifth Amendment in the following particulars:

(a) by trying the case *de novo.* Of course there was no trial *de novo.* The court did not pass on the question

of fact determined by the jury. It passed on the undisputed evidence and held that there was no jury question.

(b) by holding that defendant's evidence conclusively showed something the defendant never claimed in pleading or evidence or errors argued. The Court of Appeals held that the evidence conclusively showed that the proposed insured was not insurable for the plan and rating applied for. This was proved by the testimony of the defendant's vice-president (R. 47, 48), there was no evidence in conflict, and there could be no question of veracity involved. It was alleged in Par. 5 of the fourth defense in the answer (R. 11) and urged in the briefs.

(c) by denying the plaintiff a jury trial. Surely it can not be argued seriously that when a case is tried before a jury, and the court holds as a matter of law that there is no jury question, the plaintiff has been denied due process of law under the Fifth Amendment.

(d) by admitting evidence over plaintiff's objection in violation of the parol evidence rule and then holding such evidence to be conclusively true. This is meaningless. Counsel refers to the Note in the Record on page 32 where it appears that he objected to testimony of the agent as to what he told the proposed insured about a decreasing term policy. The only issue of fact left to the jury was whether the proposed insured was in good health on the date of the application. The admission of this testimony could have no possible bearing on this issue and there is not a word in the opinion of the Court of Appeals holding this testimony to be conclusively true.

(e) by admitting evidence in violation of Sec. 511.34 of the Iowa Code and holding such evidence conclusively true. This is also meaningless. Counsel is referring to the testimony of the agent, Bliss, that he asked the pro-

posed insured about his aviation activities and he gave a negative answer which was written in the application before he signed it (R. 32, 35). The Iowa statute referred to provides that if no copy of the application is attached to a policy, the company cannot plead or prove the application in an action on the policy. This is not an action on the policy, but on the receipt. No policy was ever issued and no copy could therefore be attached to it. This ruling could have no possible effect on the question presented to the jury. There is not a word in the opinion holding that Bliss' testimony on this point was conclusively true. Counsel makes a gross misstatement when he says in the petition: "The opinion holds Bliss' testimony is conclusively true." The Court did say in commenting on Bliss' testimony: "We have serious doubt whether there was any substantial evidence to the contrary," but it went on to hold that the question as to who was responsible for the aviation answer was not of any importance on the appeal.

(f) by passing on matters not claimed in the pleadings or in the errors assigned. A reading of the motion to direct a verdict answers this contention. All the grounds of the motion were urged and argued in the Court of Appeals.

2. That the Court of Appeals denied plaintiff a jury trial as guaranted by the Seventh Amendment by holding that the testimony of Bliss, referred to above in Paragraphs 1(d) and 1(e) was conclusively true. We repeat that there is no such holding in the opinion. What the Court did say was conclusively shown was that the proposed insured was not insurable for the plan and rating applied for.

No federal constitutional questions were raised by the pleadings or decided by the Court of Appeals. We cannot

conceive how counsel has the temerity to say to this Court that the opinion violates the Fifth and Seventh Amendments.

V.

No Question As to Federal Jurisdiction.

We do not quite understand why petitioner has urged that there is no federal jurisdiction in this case. Counsel has shown in the appendix to the petition an order of the district court overruling a motion to remand and he asserts that the case was removed to the federal court upon the statement of the defendant that it was incorporated in Massachusetts. In view of this reference we feel justified in stating to this Court that the petition for removal also stated that the defendant was a citizen of the State of Massachusetts, and that the memorandum of the district court on the motion to remand referred to in the order and which preceded the order as printed in the appendix to the petition recites that the petition for removal stated that the defendant was a citizen of Massachusetts and cited the case of *Louisville, C. & R. Co.* v. *Letson*, 43 U. S. (2 How.) 497, 11 L. ed. 353, to the effect that a corporation is a citizen of the state creating it.

The record shows the stipulation of the parties on page 1 to the effect that the United States District Court for the Southern District of Iowa had jurisdiction of the cause and that it was properly removed by the defendant from the State Court to the Federal Court. In spite of all this the petitioner asks this court to remand the case with direction to sustain its motion to remand to the state court.

Needless to say no question of this kind was raised in the Court of Appeals and no question of jurisdiction is before this court upon the petition for a writ of certiorari.

While we recognize that a federal court can on its own motion hold that it has no jurisdiction there is absolutely nothing in the record in the case at bar to justify any such holding.

CONCLUSION.

We submit that this case does not fall within any category stated in Rule 19(b) of the rules of this Court and that there are no special and important reasons for the granting of the writ of certiorari.

Respectfully submitted,

PHINEAS M. HENRY,
Counsel for Respondent.